The opinions in various ways emphasized that the Fourth Amendment protects people, not places, and that the Amendment is designed to preserve privacy against the "uninvited ear" of governmental intrusion. Governmental interceptions of private conversations without prior judicial control are now per se inadmissible in evidence in a federal court and must be suppressed where timely motions are filed:

> Searches conducted without warrants have been held unlawful 'notwithstanding facts questionably showing probable cause,' *Agnello* v. *United States*, 269 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .' *Wong Sun* v. *United States*, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent. *Katz* v. *United States*, 389 U.S. 347, 357-358 (1967) (footnotes omitted).

Admittedly, *Katz* involved governmental interception without the knowledge or consent of any party to the conversations monitored. The Government vigorously argues that in the present case Bromley voluntarily consented and the interceptions took place with his full knowledge and approval, given after consultation with his attorney. Thus

it is urged that the rule of *Katz* is not applicable to consensual surveillance.

It should first be noted that the Opinion of the Court in discussing exceptions to the warrant requirement made no reference to consensual monitoring; in fact the last sentence of the above quotation clearly precludes the existence of any exception for consensual surveillance.* Apart from the holding and strong unequivocal language of *Katz*, it is particularly significant in this context that the Court there makes approving reference to *Osborn* v. *United States*, 385 U.S. 323 (1966), with respect to the essentiality of antecedent justification.* *Osborn* is a case where a paid Government informer tape recorded conversations between himself and the defendant in order to corroborate his allegation that the defendant was endeavoring to employ him to bribe a prospective juror. In other words, *Osborn* is a case involving monitoring with the consent of one party. However, there was also a prior judicial determination of the reasonableness of the search and seizure of the defendant's statements. It was this latter condition upon which the Supreme Court primarily relied to affirm the conviction in *Osborn* and it was definitely this latter condition upon which the Supreme Court placed its emphasis in *Katz*. Thus any distinction which might be drawn between consensual monitoring and third-party monitoring has no constitutional significance as far as the Fourth Amendment privacy concept is concerned.

Assuming for a moment that Bromley may be said to have consented as a matter of law, it is clear he had no authority and did not of course even purport to consent on

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* There is not unanimity as to the effect of *Katz* in this particular regard. Indeed, Justice White in a footnote to his concurring opinion purported to preserve consensual surveillance against the thrust of the case, but the other majority opinions made no reference to the matter and earlier decisions suggesting the contrary appear to have been overruled *sub silentio*.

* *See also* Berger v. New York, 388 U.S. 41 (1967).

behalf of Jones, who at all times was wholly ignorant of the Government activities. Under the combined rationale of *Katz* and *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), it is difficult to see how Bromley's conduct, whatever it was in this regard, could possibly have constituted a waiver of the constitutional rights of Jones. Only a magistrate could give the authorization to infringe Jones' Fourth Amendment rights under the circumstances shown by this case. The rationale of *Katz* permits no other conclusion, as both the Seventh Circuit and the Tenth Circuit have since concluded. *Doty* v. *United States,* F.2d , 3 Cr. L. R. 2220 (10th Cir. 1968); *United States* v. *White,* F.2d , 3 Cr. L. R. 2005 (7th Cir. 1968), *petition for rehearing en banc granted.**

In holding that the rationale of *Katz* applies in a case where one party to a private conversation consents to the Government's interception of the conversation, the Court does not purport to hold that in fact Bromley voluntarily consented in this instance. Indeed, the contrary appears to be the case. Consent, as a matter of law, means something more than a willingness to cooperate or a formal document expressing consent. Surely a realistic rather than a formalistic meaning of consent is now required where the suggestion is that an exception should be carved out from the stringent, all-embracing constitutional prohibition of *Katz.* Consent must be wholly voluntary in fact and not merely an acquiescence coerced by the constant presence of the Government representatives, coupled with such fearful consequences as Bromley clearly envisaged if he did not go along—indictment, loss of his job, and the eventual foreclosure of the mortgage on his home.** The wise, ex-

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* Dancy v. United States, 390 F.2d 370 (5th Cir. 1968), takes the opposite view from that of the other two circuits, but the Court has noted dissent in that case of Fahy, J., sitting by designation from the District of Columbia Circuit.

** See, on the question of voluntary consent, the standards set for this jurisdiction in United States v. Laughlin, 223 F. Supp. 623 (D.D.C. 1963) and United States v. Laughlin, 222 F. Supp. 264 (D.D.C. 1963).

perienced advice of his attorney, Sandground, given these stark premises, was the advice of necessity which adds nothing to the involuntary nature of Bromley's capitulation. Bromley, required to pass between Scylla and Charybdis, had no choice. The rock and whirlpool were equally dangerous and under the circumstances he could not act voluntarily and give that degree and kind of consent which might otherwise be taken by some to justify an exception to be carved out of *Katz.**

The instant case demonstrates that judicial supervision and control of monitoring is a prerequisite in all situations. Apparently the Department of Justice had no specific written rules governing the circumstances and manner in which surveillance and interceptions of this type could occur. The case was handled by special prosecutors reporting directly to the Assistant Attorney General in charge of the Criminal Division. The agent of the Federal Bureau of Investigation in charge of the Bureau's phase of the inquiry was purposely kept ignorant of the surveillance activities because the prosecutors felt he might have to testify. The Federal Bureau of Investigation was asked to participate in the Los Angeles venture but Mr. Hoover refused. The Department then brought in agents of the Narcotics Bureau of the Treasury Department who were apparently all too eager to experiment with a new electronic gadget which it also appears they did not fully know how to operate. While the special prosecutors obtained formal clearances from their superiors, they ran the show. Under these circumstances it is not surprising that matters got out of hand and the entire ex-

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* Under this analysis it is immaterial whether the formal consent provisions of the Federal Communications Act, 47 U.S.C. § 605, or newer provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511, enacted subsequent to the indictment, apply in whole or in part. These statutes also depend upon a voluntary consent and in its absence provide no support for the Government's position under the facts of this particular case.

perience serves to underline the wisdom of an all-inclusive rule such as appears to have been laid down in *Katz*.

The monitoring of the various conversations between Bromley and Jones without prior magistrate approval violated the Fourth Amendment and any resulting recordings must necessarily be suppressed.

III.

This matter should not rest solely on these constitutional principles. Suppression is also necessary for a more immediate and equally essential reason. The Court must invoke its supervisory powers as well as suppress this effort to import manufactured evidence into this case. A member of the bar has been encouraged by the Government to elicit incriminating statements from the defendant in conversations which the Government has made elaborate plans in advance to overhear surreptitiously. This lawyer was persuaded to collaborate with Government, was given expense money, and asked to induce incriminating statements by lies and use of his special relationship of trust. He was not a neutral bystander. His own involvement with the law depended to some considerable degree upon his ability to "bell the cat."

The Government now says that its overhearings gathered in this fashion should be admitted in proof of the perjury charge against Jones. In good conscience this cannot be permitted. The federal courts have a continuing and exacting responsibility to maintain the highest standards of law enforcement and must not permit the integrity of their fact-finding processes to be demeaned. A breakdown in standards is rare and is apt to arise under the stress of the moment, particularly where the pressures of a major prosecution attracting wide public attention place an undue emphasis upon the necessity of the prosecutor showing results. Unfortunately this appears to be such a case. While the prosecution could not have clearly an-

ticipated the later rulings of the Supreme Court, there is not the slightest excuse for what occurred here in the zeal of the chase.

There are, of course, many instances where the Government does and properly should make use of informers. They are an unpleasant but inevitable aspect of law enforcement. When the informer, however, is a member of the bar who stoops to such deceitful conduct at governmental urging and with governmental financial support in an effort to induce unguarded statements from an acquaintance and thus reinforce his own efforts to escape indictment, the Government obviously overreaches.

Evidence so manufactured cannot be admitted in a perjury case for to permit its acceptance would be contrary to elementary standards of fairness. Perjury is an offense which traditionally has had the highest standards of proof to prevent the all too real possibility of a miscarriage of justice which is constantly present in cases of this type. Thus a perjury case is governed by the "two-witness rule" which is expressed in the following standard instruction upheld by a number of cases in this jurisdiction. It reads as follows:

> The uncorroborated testimony of a single witness is not sufficient to establish the falsity of the statement of the defendant under oath. If the Government relies on the testimony of a single witness to prove the falsity of the defendant's statement, it must present trustworthy evidence supporting the testimony given by the witness. Unless the Government has proved beyond a reasonable doubt the falsity of the statement of the defendant under oath, corroborated in the manner described, and has proved beyond a reasonable doubt every other essential element of the offense, you must find the defendant not guilty.

When Jones appeared before the grand jury he was asked several questions clearly prearranged and geared to lay the basis for perjury if he contradicted Bromley, who

had already testified. Jones testified differently than Bromley. To indict Jones, however, corroboration was needed. The Government made Bromley its agent. The Government interceptions were undertaken at the instance and urging of the Government primarily to get an essential element of proof of the perjury offense, that is, to manufacture corroboration.

Whatever may be the proper use of informers in other connections, the Government in a perjury case cannot use someone in a position of trust to invade private areas supported by overhearing devices or techniques in the hope that that person's relationship will enable him by trick and lies to force the suspect to reveal to the Government's uninvited ear words that may then be said to be suggestive and accordingly put in evidence as an essential element of the offense to be charged.* This goes too far. It borders on entrapment. *See Sherman* v. *United States,* 356

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* Numerous cases have been cited by the Government but they do not state the law applicable to this motion. Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966), are not cases involving electronic or telephone interceptions and the informer was allowed to testify. On Lee v. United States, 343 U.S. 747 (1952), involved electronic surveillance at a time when the Supreme Court had not held the Fourth Amendment applicable to seizure of words, a result first suggested in Silverman v. United States, 365 U.S. 505 (1961), and Olmstead v. United States, 277 U.S. 438 (1928), and its concern with doctrines of trespass, now overruled by Katz v. United States, 389 U.S. 347 (1967) was the law. Lopez v. United States, 373 U.S. 427 (1963), involved use of an electronic device by an acknowledged Government agent who was being offered a bribe and stands on its own special facts. Rathbun v. United States, 355 U.S. 107 (1957), a consensual overhearing case, was not considered in constitutional terms and, in any event, cannot withstand the broad ruling in Katz. Osborn v. United States, 385 U.S. 323 (1966), as noted previously, has been favorably referred to in both Katz and Berger v. New York, 388 U.S. 41 (1967), with respect to the judicial search warrant issues there; in neither case was consent by one of the parties in *Osborn* mentioned.

U.S. 369 (1958); *Sorrells* v. *United States,* 287 U.S. 435 (1932). None of the cases on which the Government relies involve such a blatant, plannel breach of an individual's privacy and trust. Federal courts will lose their independent integrity if they permit the truth-finding process to be undermined by practices such as these which are inherently offensive to the fair administration of justice.

IV.

In view of the foregoing, a serious question arises as to whether, and, if so, to what extent, Bromley may testify concerning his intercepted conversations with Jones. It is significant that Bromley had no precise recollection of the crucial telephone call from Jones that preceded the first interception. Similarly, when asked about conversations with Jones during the Los Angeles meetings his recollection of the unrecorded portions of the admittedly garbled and incomplete transcript was practically nonexistent. Bromley exhibited all of the testimonial characteristics of a cooperating informer who has repeated his tale so frequently that he automatically responds without any true ability to differentiate between the desired version of events and his recollection of the same events. Even under normal circumstances the testimony of an admitted perjurer should be received with caution and scrutinized with care.

While the question of Bromley's credibility is ultimately one for the jury, the Court has the duty to keep from the jury any testimony which is based on Bromley's reliance on the Government interceptions, testimony that is nothing more than a regurgitation of the illegal transcripts themselves. This is particularly important in this instance because the case against Jones insofar as it rests on the interceptions is based on inference and innuendo. The intercepted statements of Jones are not flatly incriminating and their significance depends largely on other circum-

stances, the tone used and the complete version and context in which his statements were made.

Accordingly, the Court has determined that in the event the Government proposes to interrogate Bromley concerning any of the intercepted conversations, an inquiry should first be held, out of the presence of the jury, to determine whether Bromley's recollection is based in whole or in part on refreshment from or reliance at any time upon the transcripts of the interceptions. Where this is the case, his testimony must then also be suppressed. Bromley is in no different position to this extent than would be the Government representative who listened in while monitoring. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920); *Wong Sun* v. *United States,* 371 U.S. 471 (1963).

If there are other fruits of the Government's illegal conduct these must be suppressed but such matters can best be dealt with by evidentiary objections at the trial.

Finally, the Court wishes to make this comment. If, as the Court has concluded, the Fourth Amendment protects the privacy of a citizen against the Government's "uninvited ear," the Government may not use or rely on the transcripts of the words which the Government illegally intercepted and its informer may not use or rely on the transcript of the words. The decision of the Supreme Court in *Hoffa* v. *United States,* 385 U.S. 293 (1966), appears to preserve the right of the informer to testify unaided by the transcripts of an illegal governmental monitoring but *Hoffa* preceded *Katz* and it now well may be that an informer like Bromley may not under any circumstances testify concerning conversations which the Government illegally monitored. That issue is reserved for consideration at the time the question of the nature and scope of Bromley's testimony is before the Court. The Court does not wish to determine this at this time since counsel have not had a full opportunity to brief and argue the point.

Accordingly, the Court has concluded that the interceptions in issue in this motion must be suppressed both under the Fourth Amendment to the Constitution and under a discretionary exercise of the Court's supervisory power over the administration of justice. Testimony of Bromley will also be suppressed to the extent indicated.

Submit appropriate order on notice.

(Signed) GERHARD A. GESELL
United States District Judge

September 30, 1968